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No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether 28 U.S.C. § 2254 requires a *pro se* state prisoner to present *Wainwright* v. *Sykes* "cause and prejudice," the threshold requirement for federal court review, first to the state court as a prerequisite to federal court consideration.

II. Where a constitutional claim is raised by a contemporaneous objection at trial, listed in the Notice of Appeal, and yet is not pursued on direct appeal, whether the district court should hold an evidentiary hearing to determine whether the attorney's conduct was inadvertent and hence "cause" under *Wainwright* v. *Sykes*.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. 28 U.S.C. § 2254 DOES NOT REQUIRE A *PRO SE* STATE PRISONER TO FIRST PRESENT *WAINWRIGHT* v. *SYKES* "CAUSE" AND "PREJUDICE," THE THRESHOLD REQUIREMENTS FOR FEDERAL REVIEW, TO THE STATE COURT AS A PREREQUISITE TO FEDERAL COURT CONSIDERATION	8
A. *Sykes* "Cause" Is A Standard For Federal Habeas Courts And Does Not Raise An Exhaustion Issue Under 28 U.S.C. § 2254	9
B. Even If *Sykes* "Cause" Must Be Exhausted In State Court, Carrier Has Already Exhausted His Virginia Remedies	11
II. WHERE A CONSTITUTIONAL CLAIM IS RAISED BY A CONTEMPORANEOUS OBJECTION AT TRIAL, LISTED IN THE NOTICE OF APPEAL, AND YET IS NOT PURSUED ON DIRECT APPEAL, THE DISTRICT COURT SHOULD HOLD AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE ATTORNEY'S CONDUCT WAS INADVERTENT AND HENCE "CAUSE" UNDER *WAINWRIGHT* v. *SYKES*	17
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Briley v. *Bass*, 584 F. Supp. 807 (E.D. Va. 1984) 24
Engle v. *Isaac*, 456 U.S. 107 (1982) 10
Evitts v. *Lucey*, 105 S.Ct. 830 (1985) 22
Fay v. *Noia*, 372 U.S. 391 (1963) 18
Heath v. *Alabama*, 54 U.S.L.W. 4016 U.S. December 3, 1985) 19
Hill v. *Sielaff*, No. 85-0395-R (E.D. Va. June 25, 1985) . 24
Jones v. *Barnes*, 463 U.S. 745 (1983) 17, 20
Lopez v. *Landon*, No. 84-1048-AM (E.D. Va. June 25, 1985) 24
Reed v. *Ross*, 104 S. Ct. 2901 (1984) 23
Slayton v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975) 12
Strickland v. *Washington*, 104 S. Ct. 2052 (1984) 22, 23
Townsend v. *Sain*, 372 U.S. 293 (1963) 15, 16
United States v. *Cronic*, 104 S. Ct. 2039 (1984) 23
Wainwright v. *Sykes*, 433 U.S. 72 (1983) ..... *passim*

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. VI 22

STATUTES AND RULES:

28 U.S.C. § 2254 (1982) ..... *passim*
Section 8.01-654(B)(2), Code of Virginia 16
Section 17-116.01, Code of Virginia 13
Virginia Supreme Court Rule 5:17(c) 13
Virginia Supreme Court Rule 5:21 ..... 12, 13, 14, 16
Virginia Supreme Court Rule 5:25 ..... 13, 14

OTHER AUTHORITIES:

H.R. Rep. No. 308, 80th Congress, 1st Sess. A180 (1947) 10
American Bar Association, Standards for Criminal Justice 4-8.2 and Commentary 21

OPINIONS BELOW

A panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's opinion and remanded this case for an evidentiary hearing. The panel opinion is reported at 724 F.2d 396 (4th Cir. 1983).

Sitting en banc, the United States Court of Appeals for the Fourth Circuit adopted the decision of the panel. The en banc opinion is reported at 754 F.2d 520 (4th Cir. 1985) (en banc).

JURISDICTION

The judgment of the panel was entered on December 27, 1983. (Pet. App. 3).[1] The en banc opinion, adopting the panel opinion, was entered on February 7, 1985. (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

28 U.S.C. § 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

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[1] References to the Commonwealth's Appendix to its Petition for Writ of Certiorari are cited (Pet. App.). References to the Joint Appendix are cited (J.A.). The Record of Appeal is in three volumes. References to Volume I are cited to the appropriate tab, e.g. (R. I at tab 2). References to Volume II are cited to the pertinent page, e.g. (R. II at 25).

> State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Virginia Code § 8.01-654 is reproduced at App. 17-18 of the Joint Appendix.

Rule 5:21 of the Rules of the Supreme Court of Virginia, at the time of Carrier's trial and direct appeal,[2] provided:

> The petition for appeal shall contain assignments of error and the form, contents and length of the petition for appeal shall conform in all respects to the requirements of the appellant's opening brief. Error will not be sustained to any ruling below unless objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. An assignment of error which merely states that the

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[2] The substance of former Rule 5:21 is now contained in Rules 5:17(c) and 5:25, which appear *infra*, at nn.4-5.

judgment is contrary to the law and the evidence is not sufficient.

STATEMENT OF THE CASE

Clifford Carrier, the respondent, is an inmate in the Virginia state penal system, currently serving a forty-five year sentence for rape and abduction. He was convicted in 1977 following a jury trial in the Circuit Court of the City of Virginia Beach, Virginia.

Prior to trial, defense counsel moved to discover all:

> statements of the victim, which specifically outlines [sic] the descriptions that she provided to the Virginia Beach Police Department, or any member of the State Police Department of her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place.

(R. II at 11). The judge examined the statements *in camera* and denied the request, finding that the statements contained "no evidence of an *exculpatory* nature." (R. II at 31) (emphasis added). Immediately before trial, defense counsel again requested the victim's statements. Following an *in camera* examination, the court denied the request stating: "[T]he court . . . is of the opinion that nothing therein is of an exculpatory nature which should be properly . . . disclosed to the defendant." (Tr. Transcript at 151). The court ordered the statements sealed. Defense counsel objected. (Tr. Transcript at 151-52).

After Carrier's conviction, defense counsel filed a Notice of Appeal to the Virginia Supreme Court, assigning seven errors including:

> Did the trial Judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial, and during the course of the trial?

(R. II at 83). Without consulting with his client (J.A. 10), counsel filed an appellate brief, denominated under Virginia practice as a petition for appeal, that failed to address this discovery claim. (R. I at tab 8). The Virginia Supreme Court refused the appeal on April 27, 1978. (J.A. 4). This Court denied certiorari on January 8, 1979. *Carrier* v. *Virginia*, 439 U.S. 1076 (1979).

In February of 1980, Carrier filed a *pro se* state habeas corpus petition alleging that the withholding of the victim's statements denied him due process. (R. I at tab 3). The Commonwealth of Virginia moved to dismiss his petition on the ground that, "although he appealed his convictions to the Virginia Supreme Court, he failed to present any of the allegations he now makes." (R. I at tab 3). Carrier then filed a "Motion for Appointment of Counsel and Rebuttal," stating:

> Petitioner contends that he should not be made to document all his claims without benifit [sic] of counsel, and request that counsel be appointed so that he may produce a more colorable claim in this court. Also, that his constitutional rights may further be protected.

(J.A. 5). Without appointing him counsel, the circuit court dismissed Carrier's habeas petition "for the reasons stated in the Motion to Dismiss." The Virginia Supreme Court affirmed the circuit court's decision on June 12, 1980. (J.A. 7).

Carrier, again proceeding *pro se*, petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus. Carrier's only claim was the denial of due process on the discovery matter:

> The Prosecution deliberately witheld [sic] Statement made by the prosecutrix from Petitioners attorney. Petitioners attorney filed a request for dis-

> covery with the trial court Judge and the request was denied by the Judge.
>
> 'Petitioner was denied the Right to Discovery.'
>
> Petitioner contends that the statement would have been favorable to his defense and was deliberately withheld and suppressed by the Prosecution. Therefore Petitioner was denied the right to a fair trial.

(R. I at tab 2). The Commonwealth filed a Motion To Dismiss on the ground that Carrier's failure to pursue the issue on direct appeal barred collateral attack in federal court and that Carrier failed to exhaust state remedies. (R. I at tab 3). The Commonwealth suggested that Carrier, in order to exhaust state remedies, file a second petition for a writ of habeas corpus in the state courts and explain why the discovery issue was not raised on direct appeal. In the alternative, the Commonwealth suggested that Carrier return to the state habeas court to raise the substantive issue of ineffective assistance of counsel. (R. I at tab 3). Although Carrier asked the district court to appoint counsel to represent him (R. I at tab 9), he was required to proceed *pro se*.

The case was referred to a United States Magistrate who recommended dismissal because of procedural default under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). The magistrate also ruled that Carrier had not exhausted his state remedies, upon a reading of Va. S. Ct. Rule 5:21 that Carrier could have received relief in a Virginia habeas proceeding if he had shown "justifiable cause" such as "incompetency of counsel" for his procedural default. (R. I at tab 13).

Carrier replied to the magistrate's report with a "Motion of Objection and Exception," arguing that the failure to raise the discovery issue on direct appeal "was

not due to any fault of his" but "was the results of eneffective [sic] assistance of counsel." (J.A. 10). He further stated that he was "not allowed by his then court appointed attorney to fully take part in the preparation of his appeal." (J.A. 10). Carrier requested an evidentiary hearing to prove the truth of his allegations. (J.A. 10).

The district court adopted the magistrate's recommendation and dismissed Carrier's petition on the basis of procedural default. The district court refused to consider the "cause" proffered by Carrier on the ground that Carrier had failed to exhaust this "cause" issue in the Virginia courts. (Pet. App. 28).

Carrier appealed to the United States Court of Appeals for the Fourth Circuit. There, for the first time on collateral review, he was appointed counsel. On December 27, 1983, a panel of the court reversed the district court's order. *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983). (Pet. App. 3). In doing so, the court of appeals held that "[t]he exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not the proffer of *Wainwright* cause and prejudice," 724 F.2d at 402, and that "attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy." *Id.* at 401. The court remanded the matter to the district court for an evidentiary hearing to determine "whether counsel's failure to appeal the *Brady* issue was in fact attorney error or whether it was simply unsuccessful appellate strategy." *Id.* at 403. On remand, the district court was also to determine whether Carrier had been prejudiced. *Id.*

On February 7, 1985, the Fourth Circuit, in an en banc per curiam opinion, adopted the panel's majority opinion.

Carrier v. *Hutto*, 754 F.2d 520 (4th Cir. 1985) (en banc). (Pet. App. 1). The four dissenting judges adopted the panel's dissent.

This Court granted certiorari on July 1, 1985.

SUMMARY OF ARGUMENT

I. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), holds that a federal habeas court should not consider an issue which is barred by a state procedural default. *Sykes* provides an exception where there is "cause" and "prejudice." As this is a prudential threshold to review in federal court, there is no need to first exhaust this issue before a state court.

If there is a requirement that this issue be presented to a state court, that requirement does not apply to this case. Rule 5:21 of the Virginia Supreme Court Rules then in effect provided no remedy for a procedural default that occurred on appeal as distinguished from one that occurred at trial. The procedural default relied upon by the Commonwealth in this case was the failure to raise an issue in an appellate brief that had been raised through a contemporaneous objection at trial and preserved in the Notice of Appeal.

Moreover, at the state habeas level, Carrier raised the constitutional claim that underlies the instant case and sought counsel to aid him in presenting that claim in a proper manner. No counsel was appointed. In this circumstance Carrier did all that can be reasonably required to present the issue to the state habeas court.

II. The constitutional claim underlying the instant case was raised through a contemporaneous objection at trial. The procedural default occurred on appeal. On this record it is unknown whether that default was by inadvertence of counsel or the result of strategic decision. The

Fourth Circuit correctly remanded this case to the district court for a hearing on that issue.

This case is different from *Sykes* where the procedural default was at trial. The reasoning of *Sykes* and the values to which it referred are concerned solely with trial procedural defaults. *Sykes* itself preserved for another day consideration of defaults that did not occur at trial and were not strategic in nature.

This case presents the issue left open in *Jones* v. *Barnes*, 463 U.S. 745 (1983), namely whether counsel's failure to raise on appeal claims preserved at trial would constitute *Sykes* cause. That issue should be decided only upon an adequate record. The Fourth Circuit correctly remanded this case for an evidentiary hearing at which an adequate record could be prepared.

ARGUMENT

I. 28 U.S.C. § 2254 DOES NOT REQUIRE A *PRO SE* STATE PRISONER TO PRESENT *WAINWRIGHT* V. *SYKES* "CAUSE AND PREJUDICE," THE THRESHOLD REQUIREMENT FOR FEDERAL COURT REVIEW, FIRST TO THE STATE COURT AS A PREREQUISITE TO FEDERAL COURT CONSIDERATION.

The Commonwealth here argues that, before a federal court may consider whether a habeas petitioner has "cause" to overcome the procedural default bar of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the issue of "cause" must first be presented to the state court. This is an argument that a federal court may not consider an issue going to its own review threshold without first receiving guidance from a state court. However, *Sykes* "cause" does not go to the constitutional issue that forms the merits of a habeas petition; rather, it is this Court's self-imposed

prerequisite for federal review once a state court has imposed a procedural bar. We respectfully submit that the position urged by the Commonwealth has never been the law and should not become the law through this case.

A. *Sykes* "Cause" Is An Entry Standard For Federal Habeas Courts And Does Not Raise An Exhaustion Issue Under 28 U.S.C. § 2254.

The Fourth Circuit correctly decided that this case does not present an exhaustion issue. 724 F.2d 396, 402 & n.8 (1983). "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Id.* at 402.

In contesting this holding, the Commonwealth misconstrues *Sykes*. Because the defense counsel in *Sykes* did not object at trial to the admission of the defendant's confession, Florida, invoking its contemporaneous objection rule, refused to consider in a habeas proceeding the admissibility of the confession. *Sykes*, 433 U.S. at 75, 85-86. The only issue in *Sykes* was "the adequacy of state grounds to bar federal habeas corpus review." *Id.* at 81. Indeed, this Court found that exhaustion of state remedies was not an issue. *Id.* at 80-81.

In deciding *Sykes*, this Court held that the Florida contemporaneous objection rule was "an independent and adequate state procedural ground," which normally would bar federal habeas review of the procedurally waived issue. *Id.* at 86-87. This Court held further that this general rule would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim" if the habeas petitioner could show "cause" for not complying with a state procedural rule and "prejudice" resulting from the application of such a rule. *Id.* at 91. This "cause and prejudice" exception, it should

be emphasized, would allow a federal court, in the interests of justice, to review a state petitioner's constitutional claim "for the first time." *Id.* at 90-91.

Five years later, in *Engle* v. *Isaac*, 456 U.S. 107 (1982), this Court reaffirmed *Sykes*' treatment of exhaustion. This Court found that *Engle*, like *Sykes*, was not an exhaustion case. 456 U.S. at 125 n.28. In *Engle*, Ohio invoked its contemporaneous objection rule to bar appellate consideration of respondents' due process argument regarding jury instructions at trial. *Id.* at 125. This Court stated the issue before it as folllows: "We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding, *a constitutional claim* that they forfeited before the state courts." *Id.* (footnote omitted) (emphasis added). The Court then focused directly upon whether there was *Sykes* "cause" to avoid the state procedural bar, *id.* at 130-34, even though that issue had not been presented to the Ohio courts. *Id.* at 113-16, 122-25. Exhaustion of *Sykes* "cause" was not required.

The *Sykes* and *Engle* approach to exhaustion is consistent with the plain language of the exhaustion requirement in 28 U.S.C. § 2254.[3] Section 2254(b)-(c) provides that before a state prisoner may apply for federal habeas, he must have "exhausted the remedies available in the courts of the State. . . ." The statute goes on to make

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[3] In addition, nothing in the legislative history of this provision suggests otherwise. When Congress added section 2254 in 1947, the House Report on the entire bill merely stated: "This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S.Ct. 448, 321, [sic] U.S. 114, 88 L. Ed. 572.)." H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). The "existing law" to which Congress referred, of course, only required that a federal habeas petitioner first exhaust his *constitutional* claims in state court.

explicit that a petitioner "shall not be deemed to have exhausted" state remedies "if he has the right under the law of the State to raise, by any available procedure, *the question presented.*" (emphasis added). "The question presented" in the petition, of course, is the constitutional claim that forms the substance of his asserted right to relief. This is quite different from a threshold requirement of cause by which he can gain substantive review by a federal court.

Carrier, it should be noted, in fact presented his constitutional claim to the state habeas court. (R. I at tab 8). He therefore fulfilled the exhaustion requirement of section 2254(b)-(c). As in *Sykes* and *Engle*, no more is required.

B. Even If *Sykes* "Cause" Must Be Exhausted In State Court, Carrier Has Already Exhausted His Virginia Remedies.

Assuming, *arguendo*, that section 2254(b)-(c) exhaustion is required as to *Sykes* "cause," Carrier met that requirement in this case. We shall demonstrate that Virginia provided no procedure in which to raise *Sykes* "cause"; that whatever procedure Virginia provided, Carrier followed to no avail; and that there is no further practicable procedure still available to him.

It should be recalled that the procedural default that is relevant here occurred on appeal and not at trial. This is *not* a case of failure to make a contemporaneous trial objection. This factor renders whatever relief may have otherwise been available in the Virginia courts irrelevant here.

As the Commonwealth points out to this Court (Pet. Brief at 4 n.4), under Virginia law a petitioner may raise on state habeas only those issues which meet the require-

ment of Virginia Supreme Court Rule 5:21. At the time Carrier filed his state habeas petition, Rule 5:21 provided:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

Va. S. Ct. R. 5:21. As the Commonwealth points out (Pet. Brief at 2), Rule 5:21 provides a "good cause" and an "ends of justice" exception to its procedural default rule. It is clear, however, that this exception applies only to the failure to object *at trial*. There is no such exception for procedural default *on appeal*, and the Commonwealth points to no authority that states otherwise. *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), to which the Commonwealth does refer (Pet. Brief at 27-28), is of no assistance. *Slayton* concerned the failure to make a contemporaneous objection *at trial*. Of course, the "good cause" and "ends of justice" exception to Rule 5:21 apply to procedural defaults at trial. *Slayton* had no occasion to consider the effect of Rule 5:21 on a procedural default on appeal—which is the case here—for the explicit language of Rule 5:21 provided otherwise.

That Virginia has not inadvertently made this differentiation between procedural defects at trial and those on appeal can be seen from the August 1, 1985, revisions of the Virginia Supreme Court Rules, to which the Commonwealth draws this Court's attention. (Pet. Brief at 2 n.3). The Commonwealth advises this Court that the 1985 revision made no change in substance from the preceding

rule. In the current rule, the subject of review of errors at trial was placed into Rule 5:25.[4] The provision of procedural default on appeal was placed into 5:17(c).[5] Only Rule 5:25 of the revised rules contains the "good cause" and "ends of justice" exception.

Even if *Slayton* can be read out of its context to furnish instruction for appellate procedural defaults, it does not aid the Commonwealth's position. At most, *Slayton* can be construed as equating "good cause" in Rule 5:21 to "ineffective assistance of counsel." *Slayton* concerned a failure to make a contemporaneous trial objection that an in-court identification of the defendant was tainted by an impermissibly suggestive pre-trial identification. Parrigan, the petitioner, for the first time on state habeas contended the identification was a denial of his constitutional rights. Moreover, he contended that he had been denied the effective assistance of counsel at trial. The Virginia trial court, after an evidentiary hearing, ruled that Parrigan's counsel was not ineffective but held for Parrigan on the identification issue. On appeal, the sole issue considered was whether the failure of Parrigan's trial counsel to object to the in-court identification at trial

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[4] Rule 5:25, in pertinent part, now provides: "Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. S.Ct. R. 5:25 (1985).

[5] Rule 5:17(c), in pertinent part, now provides: "The provsions of Rule 5:25 shall apply to limit the questions upon which this court will rule on appeal. Only errors assigned in the petition for appeal will be noticed by this Court." Va. S.Ct. R. 5:17(c) (1985). The Rule contains a similar provision for appeals from the Court of Appeals, *id.*, the intermediate appellate courts established effective January 1, 1985. Va. Code § 17-116.01 (Supp. 1985).

barred the issue on state habeas. Reversing the trial court's issuance of a writ of habeas corpus, the Virginia Supreme Court, apparently applying but without citing Rule 5:21, stated:

> [T]he court below erred, absent a showing of ineffective assistance of counsel in failing to raise that question, in permitting inquiry on this question for the first time in the habeas corpus proceeding.

215 Va. at 29, 205 S.E.2d at 682. Thus, if *Slayton* speaks at all to the issue here, it says that "good cause" under Rule 5:21 meant "ineffective assistance of counsel"—which is a separate and independent constitutional claim. Carrier asserts no such claim before this Court.

It bears repetition that the "good cause" exception in Rule 5:21, now Rule 5:25—whatever it may mean—applies only to procedural defaults at trial. There is no such exception to a procedural default on appeal—which is this case. Thus, even if section 2254(b)-(c) exhaustion is applicable to *Sykes* "cause," there is no remedy available in Virginia procedure by which the issue can be raised and pursued.

Moreover, if Virginia provided a procedure to raise *Sykes* "cause," Carrier made every reasonable effort to exhaust that procedure. In 1979, Carrier filed a state habeas petition *pro se*. In that petition, he asked the Virginia courts to consider the due process discovery issue which his trial attorney had raised at trial. Carrier asked the Virginia circuit court to appoint counsel to help him: "Petitioner contends that he should not be made to document all his claims without benifit [sic] of counsel, and request [sic] that counsel be appointed so that he may produce a more colorable claim in this court." (J.A. 6). The state court did not appoint counsel for Carrier, nor did the court conduct an evidentiary hearing. Rather, the court dismissed the petition. (R. I at tab 12).

We respectfully submit that Carrier could have done no more. To expect a lay person to understand the intricacies of *Sykes* "cause," as a threshold condition to federal court entry, and to present that "cause" in a *pro se* habeas petition in state court is unrealistic. Carrier asked for the assistance of counsel in order to present his petition in a proper manner. (J.A. 5-6). Presumably, counsel would have seen that all of the threshold requirements that might have stood in the way of the consideration of the substantive constitutional claim that Carrier did in fact raise were met.

In the alternative, the state habeas court could have requested an affidavit from the trial counsel. This affidavit could have resolved the "cause" issue, or at least shown whether a more expansive evidentiary hearing was necessary. While the Commonwealth asserts that its courts must rule on *Sykes* "cause" before any federal consideration, here its courts did nothing to explore whether Carrier had a *Sykes* claim. The Commonwealth should not be allowed to have it both ways. Either state courts must make some minimal effort to allow a *pro se* petitioner to contest a state procedural bar, or states such as Virginia, whose courts dismiss without inquiry, cannot later complain of a subsequent federal examination of *Sykes* "cause."[6]

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[6] In *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court explained the circumstances under which a federal district court must grant a habeas petitioner an evidentiary hearing. In *Townsend*, the Court held that in considering a petition which alleges facts that, if true, warrant relief, a federal court has the power to hold an evidentiary hearing. *Id.* at 312. The Court further held that under some circumstances a district court is absolutely required to exercise this power: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not

Thus, Virginia courts were presented with ample opportunity to consider any reason not to apply the procedural bar of their Rule 5:21. As Carrier did all he could, no more should be required.

Finally, the Commonwealth suggests that Carrier may still have a habeas remedy in its courts. (Pet. Brief at 29 n.25). With commendable candor, the Commonwealth acknowledges that Virginia law bars successive habeas petitions (Pet. Brief at 29 n.25): "No writ shall be granted on the basis of any allegation the fact of which the petitioner had knowledge at the time of filing any previous petition." Va. Code § 8.01-654(B)(2) (J.A. 17-18). Nonetheless, the Commonwealth proffers to this Court that, should Carrier again petition for state habeas, the Commonwealth would not rely upon this statutory bar. (Pet. Brief at 29 n.25). However, the Commonwealth also points out the obvious: there is no assurance that the Virginia courts would be inclined to ignore a statutory bar solely because the Commonwealth fails to raise it. We respectfully submit that if this is the best the Commonwealth can offer, it illustrates the chimerial nature of any state remedy.

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receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 312.

Because the Virginia courts did not give Carrier any evidentiary hearing before declaring a procedural default, the Fourth Circuit correctly ordered the district court on remand to conduct a hearing.

II. WHERE A CONSTITUTIONAL CLAIM IS RAISED BY A CONTEMPORANEOUS OBJECTION AT TRIAL, LISTED IN THE NOTICE OF APPEAL, AND YET IS NOT PURSUED ON DIRECT APPEAL, THE DISTRICT COURT SHOULD HOLD AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE ATTORNEY'S CONDUCT WAS INADVERTENT, AND HENCE "CAUSE" UNDER *WAINWRIGHT* V. *SYKES*.

This case presents the issue posed but not answered in *Jones* v. *Barnes*, 463 U.S. 745, 754 n.7 (1983): "whether counsel's refusal to raise [on appeal] requested claims would constitute 'cause' for a petitioner's default within the meaning of *Wainwright* v. *Sykes*." The answer was given by Justice Blackmun: "[C]ounsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute 'cause and prejudice' for any resulting procedural default under state law." *Jones*, 463 U.S. at 755 (Blackmun, J., concurring).

The only distinction between *Jones* v. *Barnes* and the instant case is that there is no showing on this record that Carrier insisted that the discovery issue by raised on appeal. It bears emphasis that the court of appeals did no more in this case than to remand it for an evidentiary hearing at which a record could be developed.

In *Sykes*, this Court held that an attorney's failure to make a timely objection at trial under the state's contemporaneous objection rule barred federal habeas review, absent a showing of "cause" and "prejudice." 433 U.S. at 86-87. In reaching its conclusion, this Court focused at

length on the value of the contemporaneous objection rule both at trial and to a later habeas proceeding. Thus, this Court was concerned with 1) making the criminal trial the "main event" in the adjudication of guilt or innocence, *id.* at 90; 2) preserving the efficiencies inherent in the contemporaneous objection rule, which may lead to a ruling sustaining the objection, *id.* at 88; 3) permitting the prosecution to reassess its position while there is still time to act upon that reassessment, *id.* at 89; 4) perfecting a record that would be of aid on direct appeal and in any subsequent habeas proceeding, *id.* at 88-89; and 5) discouraging "sandbagging" by defense counsel. *Id.* at 89. None of these values is implicated in the instant case.

Here, defense counsel made a contemporaneous objection. The trial court considered the matter fully and whatever record was appropriate to the objection was developed. There was no "sandbagging" at trial.[7] The procedural default occurred only after defense counsel raised the issue in his Notice of Appeal and then inexplicably failed to include it in his petition for appeal to the Virginia Supreme Court.[8]

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[7] This Court made it clear in *Sykes* that it rejected the "sweeping" rule in *Fay* v. *Noia*, 372 U.S. 391 (1963), only to the extent that *Fay* had been applied far beyond the appellate context in which it had been fashioned to also cover "failures to raise individual substantive objections in the state trial." 433 U.S. at 87-88 n.12. This Court added, "We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court." *Sykes*, 433 U.S. at 88 n.12. The *Sykes*' Court's focus, therefore, was on cases in which there was no contemporaneous objection at trial.

[8] In his dissenting opinion, Judge Hall posits for the first time that counsel did not properly preserve the claim of error at trial. *Carrier*, 724 F.2d at 403-04 (Hall, J., dissenting). That issue, however, was not raised in the Petition for Certiorari and thus is not before this Court.

Appeal, of course, is quite different from trial. Unlike the hectic pace of trial, the appellate process affords the attorney time for reflection, research, and full consultation with his client. Moreover, it can be stated without fear of contradiction from any experienced advocate that no attorney would make a contemporaneous objection at trial, raise the issue in the Notice of Appeal, and then deliberately exclude the issue from his petition for appeal with the intent of later running the issue through today's habeas gauntlet.

This Court in *Sykes* also stressed that it left "for another day" the scope of federal habeas review "of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court." 433 U.S. at 88 n.12. Of course, it may be the case here that appellate counsel made a strategic decision to abandon the discovery issue on appeal. It may also be that the matter was left out due to negligence or inadvertence.

Heath v. *Alabama*, 54 U.S.L.W. 4016, 4018 U.S. December 3, 1985).

Moreover, the Commonwealth did not argue this matter to either of the courts below or to the state courts on habeas. It should be noted that in its Motion To Dismiss in the district court the Commonwealth, in arguing failure to exhaust, asserted that Carrier could file a petition for a writ of habeas corpus in the state courts urging *Sykes* "cause" or "ineffective assistance of counsel for failure of his counsel to raise the issue at trial or on appeal." (R. I at tab 3). However, at no time in any of its papers filed either on state habeas or in either court below did the Commonwealth present the argument that trial counsel did not properly preserve the claim of error at trial.

For both of these reasons, the Solicitor General incorrectly urges this Court to reach that issue at this time. (S.G. Brief at 21).

The resolution of this factual issue is precisely the purpose of the Fourth Circuit's remand.[9]

Affirmance by this Court will hardly lead to a parade of convicted felons being set free. That fear relies on the questionable assumption that state criminal trials are rife with constitutional error. Moreover, these dire predictions are not germane to this case. Relief will be limited to those narrow situations in which the meritorious issue was preserved by a contemporaneous objection at trial, raised in a Notice of Appeal, and then not pursued upon further briefing. The number of such cases is miniscule.

Further, affirmance of the Fourth Circuit decision will not unduly burden the federal courts. In the small number of cases meriting an evidentiary hearing, the scope of the inquiry would be limited to a determination of counsel's motivation and, perhaps, whether counsel consulted with his client about the issues the record presented. Such a hearing could occur upon sworn affidavits, at least to the extent of establishing a *prima facie* case. Even this requirement can be avoided if such an inquiry is made in the state court's habeas proceeding.

The Commonwealth suggests that this case differs from the situation to which Justice Blackmun referred in *Jones* v. *Barnes*. (Pet. Brief at 16 n.14). In *Jones*, the habeas petitioner asserted that he was denied his sixth amendment right to effective assistance of counsel on the ground that his attorney did not include in his appellate brief issues that the petitioner had briefed in a draft he had presented to counsel. 463 U.S. at 747-48. As this

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[9] The Solicitor General suggests that "there is every reason to believe that counsel's actions in this case were deliberate." (S.G. Brief at 21). There is, of course, no factual finding in the record to support that conclusion.

Court pointed out in *Jones*, there was full and ample consultation between counsel and client before counsel exercised his professional judgment on what issues to raise. *Id.*

This case is quite different. Upon Carrier's allegations below, there was minimal consultation.[10] There is no showing that Carrier was advised of what issues could be raised on appeal and thus, on this record, there was no showing of an opportunity for Carrier to "insist" that his attorney pursue the discovery issue.[11] *Id.* Regardless, the Fourth Circuit appropriately declined to decide the case in a factual vacuum and remanded it to determine what indeed had happened.

The Commonwealth urges that defining *Sykes* "cause" as requiring anything less than ineffective assistance of counsel would "as a practical matter [amount] to a near invalidation of state procedural default rules." (Pet. Brief at 23). While acknowledging *Sykes* as "a great step in the right direction," (Pet. Brief at 23), it also urges that the core of *Sykes* be eviscerated. When this case is correctly seen as having nothing whatsoever to do with the contem-

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[10] In his Motion of Objection and Exception, Carrier asserted, "Petitioner was not allowed by his then court-appointed attorney to fully take part in the preparation of his appeal, nor was he allowed to apraise [sic] it before it had been filed and denied by the State Supreme Court of Virginia." (J.A. 10).

[11] The American Bar Association Standards for Criminal Justice make it incumbent upon appellate counsel to "discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal," and to explore carefully "the possible errors that could be pressed on appeal." Commentary to ABA Standard 4-8.2. "To make the defendant's ultimate choice a meaningful one," the Standard advises that counsel must communicate his evaluation of the case "in a comprehensible manner." *Id.*

poraneous objection rule, but only appellate default of a preserved issue, it is clear that the Commonwealth's fears are groundless.

Moreover, if the Commonwealth's argument is adopted by this Court, the "cause and prejudice" exception, so carefully written in *Sykes* to accommodate both the interests of comity and the need to enforce the federal Constitution, would be eliminated totally. Indeed, the Commonwealth admits with candor that that is the force of its argument, for it urges this Court to replace *Sykes* with *Strickland* v. *Washington*, 104 S.Ct. 2052 (1984). (Pet. Brief at 14). The Commonwealth argues that, as long as a defendant has received sixth amendment effective assistance of counsel within the standard of *Strickland*, any defaulted constitutional violation should be deemed foreclosed.

We urge that it is too early after *Sykes* to sweep aside so blithely the careful reasoning of Justice Rehnquist. Moreover, this case does not require it. The underlying discovery issue was raised and argued at trial. The procedural default here is limited solely to the appellate process. Thus, the Fourth Circuit's definition of *Sykes* "cause," confined to the issues presented in this case, is much narrower than the Commonwealth would have this Court believe.

Furthermore, the relief under *Strickland* is quite different from that under *Sykes*. Under *Strickland*, the sixth amendment claim, if established, is itself a ground for habeas relief and results in either freedom for the petitioner or some new procedure in state court. In *Evitts* v. *Lucey*, 105 S.Ct. 830 (1985), for example, this Court held that the petitioner had received ineffective assistance of appellate counsel when his attorney forfeited

his right to direct appeal. *Id.* at 836-37. The remedy this Court upheld was significant: either reinstatement of the appeal in state court or a new trial. *Id.* at 833, 837.

Sykes, however, does not delineate any substantive constitutional right. The only relief it offers the petitioner is federal review of his constitutional claim. Thus, *Strickland* furnishes complete habeas relief, while *Sykes* is only a threshold prerequisite to a determination of whether such relief is appropriate.[12]

Moreover, as a result of the Fourth Circuit's ruling, Carrier does not win release. At most, there will be a hearing to determine the reason that the discovery issue was not pursued in the petition for appeal. There will also be a determination of whether Carrier was prejudiced by this failure. That hearing can be a narrow inquiry appropriate to the issues raised and will produce reasoned factual findings by the district judge upon which a more rational determination can be made as to the *Sykes* criteria.[13] If the district court finds both "cause" and "preju-

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[12] The "prejudice" analyses under *Strickland* and under *Sykes* are also distinct. *Strickland* makes it clear that "prejudice" is demonstrated only when the petitioner can prove the "reasonable probability" that, but for counsel's errors, the result "*would* have been different." 104 S.Ct. 2068 (emphasis added). In *Reed* v. *Ross*, however, this Court has already defined "prejudice" under *Sykes* to mean that, but for the default, the petitioner "*might* not have been convicted." 104 S.Ct. 2901, 2908 (1984) (emphasis added).

[13] The Commonwealth notes that a single error or omission can indeed furnish the basis for *Strickland* relief. *United States* v. *Cronic*, 104 S.Ct. 2039, 2046 n.20 (1983). (Pet. Brief at 14). While we do not urge here that the failure to pursue the discovery issue in the petition for appeal constitutes ineffective assistance of counsel that would afford Carrier the reinstatement of his appeal, *see Evitts*, 104 S.Ct. 830, we do not abandon the claim that counsel's inadvertence may well have been ineffective. Rather, it remains to be determined by the finder of fact upon remand.

dice," Carrier will receive review on the merits. He will not obtain relief unless his federal constitutional rights were violated.

Finally, despite the Commonwealth's assertion to the contrary, the floodgates have not opened as a result of the Fourth Circuit's decision in this case. The Commonwealth points to only three cases raising the issue since the Fourth Circuit's opinion. (Pet. Brief at 13 n.11).[14] In none has the result been the release of the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the holding of the court below should be affirmed.

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[14] The Commonwealth cites *Briley* v. *Bass*, 584 F. Supp. 807 (E.D. Va. 1984); *Hill* v. *Sielaff*, No. 85-0395-R, slip op. at 2 (E.D. Va. June 25, 1985); and *Lopez* v. *Landon*, No. 84-1048-AM, slip op. at 2 (E.D. Va. June 25, 1985).